

1 SENATE BILL 645

2 **49TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2009**

3 INTRODUCED BY

4 Rod Adair

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10 AN ACT

11 RELATING TO LITIGATION; ENACTING THE VEXATIOUS LITIGATION ACT;
12 OBLIGING THE RISK MANAGEMENT DIVISION OF THE GENERAL SERVICES
13 DEPARTMENT TO PROVIDE SERVICES FOR A VICTIM OF VEXATIOUS
14 LITIGATION; DEFINING "VEXATIOUS LITIGATION".

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16 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

17 Section 1. [NEW MATERIAL] SHORT TITLE.--Sections 1
18 through 5 of this act may be cited as the "Vexatious Litigation
19 Act".

20 Section 2. [NEW MATERIAL] DEFINITIONS.--As used in the
21 Vexatious Litigation Act:

22 A. "quasi-governmental entity" means a water and
23 sanitation district, a mutual domestic water consumers
24 association or a water users' association; and

25 B. "vexatious litigation" means habitual,

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1 unreasonable or frivolous litigation brought sequentially or
2 repeatedly against a quasi-governmental entity by the same
3 plaintiff or multiple plaintiffs asserting the same cause or
4 causes of action or causes of action substantially related to
5 each other; provided that "vexatious litigation" is not a cause
6 of action against a person authorized to practice law in New
7 Mexico who is representing a party or parties. "Vexatious
8 litigation" may include, but is not limited to, continuing a
9 lawsuit after discovery of the facts shows it has no merit. A
10 vexatious plaintiff shall not be shielded by the use of
11 multiple legal entities as the named plaintiff to disguise the
12 plaintiff's ongoing role in the litigation.

13 Section 3. [NEW MATERIAL] STANDARDS OF PROOF.--Vexatious
14 litigation may be proved by demonstrating that a plaintiff has:

15 A. filed twenty-five or more lawsuits in the course
16 of a single year;

17 B. brought litigation that has been dismissed for
18 lack of standing or failure to state a claim more than two
19 times in a single year;

20 C. caused more than one-half of the judges in a
21 single judicial district to be recused;

22 D. filed forty or more lawsuits in a five-year
23 period;

24 E. filed seventy-five or more lawsuits over the
25 course of a decade;

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1 F. filed one hundred twenty-five or more lawsuits
2 in a fifteen-year period;

3 G. been found by a court to have filed a lawsuit
4 with the knowledge that it has no legal basis, with a purpose
5 to bother, annoy, embarrass and cause legal expenses to the
6 defendant; or

7 H. in the reasonable judgment of the court, pursued
8 habitual or continuous abuse of the legal system.

9 Section 4. [NEW MATERIAL] DAMAGES.--A quasi-governmental
10 entity that prevails on a claim for vexatious litigation shall
11 be awarded damages in the amount of double the costs and
12 attorney fees incurred by the entity as a result of the
13 vexatious litigation.

14 Section 5. [NEW MATERIAL] LIABILITY COVERAGE FOR A QUASI-
15 GOVERNMENTAL ENTITY THAT IS THE VICTIM OF VEXATIOUS
16 LITIGATION.--The risk management division of the general
17 services department shall cover a quasi-governmental entity,
18 and its elected board of directors, that is a victim of
19 vexatious litigation, whether the directors are sued in their
20 official or personal capacities for acts arising out of their
21 official capacities.

22 Section 6. Section 15-7-3 NMSA 1978 (being Laws 1978,
23 Chapter 166, Section 8, as amended) is amended to read:

24 "15-7-3. ADDITIONAL POWERS AND DUTIES OF THE RISK
25 MANAGEMENT DIVISION.--

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1 A. The risk management division of the general
2 services department may:
3 (1) enter into contracts;
4 (2) procure insurance, reinsurance or employee
5 group benefits; provided that any proposal or contract for the
6 procurement of any group health care benefits shall be subject
7 to the provisions of the Health Care Purchasing Act; and
8 provided further that reinsurance or excess coverage insurance
9 may be placed by private negotiation, notwithstanding the
10 provisions of the Procurement Code, if the insurance or
11 reinsurance has a restricted number of interested carriers, the
12 board determines that the coverage is in the interest of the
13 state and cannot otherwise be procured for a reasonable cost
14 and the director seeks the advice and review of the board in
15 the placement and in designing private negotiation procedures;
16 (3) in the manner prescribed by Subsection E
17 of Section 9-17-5 NMSA 1978, after a notice and a public
18 hearing, prescribe by regulation reasonable and objective
19 underwriting and safety standards for governmental entities and
20 reasonable standards for municipal self-insurance pooling
21 agreements covering liability under the Tort Claims Act and
22 adopt such other regulations as may be deemed necessary;
23 (4) compromise, adjust, settle and pay claims;
24 (5) pay expenses and costs;
25 (6) in the manner prescribed by Subsection E

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1 of Section 9-17-5 NMSA 1978, prescribe by rule or regulation
2 the rating bases, assessments, penalties and risks to be
3 covered by the public liability fund, the workers' compensation
4 retention fund and the public property reserve fund and the
5 extent such risks are to be covered;

6 (7) issue certificates of coverage in
7 accordance with Paragraph (6) of this subsection:

8 (a) to any governmental entity for any
9 tort liability risk covered by the public liability fund;

10 (b) to any governmental entity for any
11 personal injury liability risk or for the defense of any errors
12 or act or omission or neglect or breach of duty, including the
13 risks set forth in Paragraph (2) of Subsection B and Paragraph
14 (2) of Subsection D of Section 41-4-4 NMSA 1978; and

15 (c) to any governmental entity for any
16 part of risk covered by the workers' compensation retention
17 fund, the surety bond fund or the public property reserve fund;

18 (8) study the risks of all governmental
19 entities;

20 (9) initiate the establishment of safety
21 programs and adopt regulations to carry out such programs in
22 the manner prescribed by Subsection E of Section 9-17-5 NMSA
23 1978;

24 (10) hire a safety program director who shall
25 coordinate all safety programs of all state agencies;

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1 (11) consult with and advise local public
2 bodies on their risk management problems; and

3 (12) employ full-time legal counsel who shall
4 be under the exclusive control and supervision of the director
5 and the secretary of general services.

6 B. The risk management division of the general
7 services department shall provide liability coverage for the
8 following risks:

9 (1) a claim made pursuant to the provisions of
10 42 USC Section 1983 against a nonprofit corporation, members of
11 its board of directors or its employees when the claim is based
12 upon action taken pursuant to the provisions of a contract
13 between the corporation and the department of health under
14 which the corporation provides developmental disability
15 services to clients of the department and the claim is made by
16 or on behalf of a client; ~~and~~

17 (2) a claim made pursuant to the provisions of
18 42 USC Section 1983 against a nonprofit corporation, members of
19 its board of directors or its employees when the corporation
20 operates a facility licensed by the department of health as an
21 intermediate care facility for the mentally retarded and the
22 claim is based upon action taken pursuant to the provisions of
23 the license and is made by or on behalf of a resident of the
24 licensed facility; and

25 (3) a claim made pursuant to the Vexatious

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1 Litigation Act by a quasi-governmental entity that has been the
2 victim of vexatious litigation, including prosecution of the
3 quasi-governmental entity's claim for vexatious litigation.

4 C. The director shall report [~~his~~] findings and
5 recommendations, if any, for the consideration of each
6 legislature. The report shall include the amount and name of
7 any person receiving payment from the public liability fund of
8 any claim paid during the previous fiscal year exceeding one
9 thousand dollars (\$1,000). The report shall be made available
10 to the legislature on or before December 15 preceding each
11 regular legislative session."

12 Section 7. Section 41-4-3 NMSA 1978 (being Laws 1976,
13 Chapter 58, Section 3, as amended) is amended to read:

14 "41-4-3. DEFINITIONS.--As used in the Tort Claims Act:

15 A. "board" means the risk management advisory
16 board;

17 B. "governmental entity" means the state or any
18 local public body as defined in Subsections C and H of this
19 section;

20 C. "local public body" means all political
21 subdivisions of the state and their agencies, instrumentalities
22 and institutions and all water and natural gas associations
23 organized pursuant to Chapter 3, Article 28 NMSA 1978;

24 D. "law enforcement officer" means a full-time
25 salaried public employee of a governmental entity whose

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1 principal duties under law are to hold in custody any person
2 accused of a criminal offense, to maintain public order or to
3 make arrests for crimes, or members of the national guard when
4 called to active duty by the governor;

5 E. "maintenance" does not include:

6 (1) conduct involved in the issuance of a
7 permit, driver's license or other official authorization to use
8 the roads or highways of the state in a particular manner; or

9 (2) an activity or event relating to a public
10 building or public housing project that was not foreseeable;

11 F. "public employee" means an officer, employee or
12 servant of a governmental entity, excluding independent
13 contractors except for individuals defined in Paragraphs (7),
14 (8), (10) and (14) of this subsection, or of a corporation
15 organized pursuant to the Educational Assistance Act, the Small
16 Business Investment Act or the Mortgage Finance Authority Act
17 or a licensed health care provider, who has no medical
18 liability insurance, providing voluntary services as defined in
19 Paragraph (16) of this subsection and including:

20 (1) elected or appointed officials;

21 (2) law enforcement officers;

22 (3) persons acting on behalf or in service of
23 a governmental entity in any official capacity, whether with or
24 without compensation;

25 (4) licensed foster parents providing care for

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1 children in the custody of the human services department,
2 corrections department or department of health, but not
3 including foster parents certified by a licensed child
4 placement agency;

5 (5) members of state or local selection panels
6 established pursuant to the Adult Community Corrections Act;

7 (6) members of state or local selection panels
8 established pursuant to the Juvenile Community Corrections Act;

9 (7) licensed medical, psychological or dental
10 arts practitioners providing services to the corrections
11 department pursuant to contract;

12 (8) members of the board of directors of the
13 New Mexico medical insurance pool;

14 (9) individuals who are members of medical
15 review boards, committees or panels established by the
16 educational retirement board or the retirement board of the
17 public employees retirement association;

18 (10) licensed medical, psychological or dental
19 arts practitioners providing services to the children, youth
20 and families department pursuant to contract;

21 (11) members of the board of directors of the
22 New Mexico educational assistance foundation;

23 (12) members of the board of directors of the
24 New Mexico student loan guarantee corporation;

25 (13) members of the New Mexico mortgage

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1 finance authority;

2 (14) volunteers, employees and board members
3 of court-appointed special advocate programs;

4 (15) members of the board of directors of the
5 small business investment corporation; ~~and~~

6 (16) health care providers licensed in New
7 Mexico who render voluntary health care services without
8 compensation in accordance with rules promulgated by the
9 secretary of health. The rules shall include requirements for
10 the types of locations at which the services are rendered, the
11 allowed scope of practice and measures to ensure quality of
12 care; and

13 (17) quasi-government entities that have
14 prevailed in a claim for vexatious litigation;

15 G. "scope of duty" means performing any duties that
16 a public employee is requested, required or authorized to
17 perform by the governmental entity, regardless of the time and
18 place of performance; and

19 H. "state" or "state agency" means the state of New
20 Mexico or any of its branches, agencies, departments, boards,
21 instrumentalities or institutions."

22 Section 8. Section 41-4-23 NMSA 1978 (being Laws 1977,
23 Chapter 386, Section 17, as amended) is amended to read:

24 "41-4-23. PUBLIC LIABILITY FUND CREATED--PURPOSES.--

25 A. There is created the "public liability fund".

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1 The fund and any income from the fund shall be held in trust,
2 deposited in a segregated account and invested by the general
3 services department with the prior approval of the state board
4 of finance.

5 B. Money deposited in the public liability fund may
6 be expended by the risk management division of the general
7 services department:

8 (1) to purchase tort liability insurance for
9 state agencies and their employees and for any local public
10 body participating in the public liability fund and its
11 employees;

12 (2) to contract with one or more consulting or
13 claims adjusting firms pursuant to the provisions of Section
14 41-4-24 NMSA 1978;

15 (3) to defend, save harmless and indemnify any
16 state agency or employee of a state agency or a local public
17 body or an employee of such local public body for any claim or
18 liability covered by a valid and current certificate of
19 coverage to the limits of such certificate of coverage;

20 (4) to pay claims and judgments covered by a
21 certificate of coverage;

22 (5) to contract with one or more attorneys or
23 law firms on a per-hour basis, or with the attorney general, to
24 defend tort liability claims against governmental entities and
25 public employees acting within the scope of their duties;

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1 (6) to pay costs and expenses incurred in
2 carrying out the provisions of this section;

3 (7) to create a retention fund for any risk
4 covered by a certificate of coverage;

5 (8) to insure or provide certificates of
6 coverage to school bus contractors and their employees,
7 notwithstanding the provisions of Subsection F of Section
8 41-4-3 NMSA 1978, for any comparable risk for which immunity
9 has been waived for public employees pursuant to Section 41-4-5
10 NMSA 1978, if the coverage is commercially unavailable; except
11 that coverage for exposure created by Sections 41-4-9, 41-4-10
12 and 41-4-12 NMSA 1978 shall be provided to its member public
13 school districts and participating other educational entities
14 of the public school insurance authority, by the authority, and
15 except that coverage shall be provided to a contractor and
16 [~~his~~] the contractor's employees only through the public school
17 insurance authority or its successor, unless the district to
18 which the contractor provides services has been granted a
19 waiver by the authority or the authority is not offering the
20 coverage for the fiscal year for which the division offers its
21 coverage. A local school district to which the division may
22 provide coverage may provide for marketing and servicing to be
23 done by licensed insurance agents who shall receive reasonable
24 compensation for their services; [~~and~~]

25 (9) to insure or provide certificates of

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1 coverage for any ancillary coverage typically found in
2 commercially available liability policies provided to
3 governmental entities, if the coverage is commercially
4 unavailable; and

5 (10) to insure or provide certificates of
6 coverage for a quasi-governmental entity that has a claim for
7 vexatious litigation.

8 C. No settlement of any claim covered by the public
9 liability fund in excess of twenty-five thousand dollars
10 (\$25,000) shall be made unless the settlement has first been
11 approved in writing by the director of the risk management
12 division of the general services department. This subsection
13 shall not be construed to limit the authority of an insurance
14 carrier, covering any liability under the Tort Claims Act, to
15 compromise, adjust and settle claims against governmental
16 entities or their public employees.

17 D. Claims against the public liability fund shall
18 be made in accordance with rules or regulations of the director
19 of the risk management division of the general services
20 department. If the director of the risk management division
21 has reason to believe that the fund would be exhausted by
22 payment of all claims allowed during a particular state fiscal
23 year, pursuant to regulations of the risk management division,
24 the amounts paid to each claimant and other parties obtaining
25 judgments shall be prorated, with each party receiving an amount

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1 equal to the percentage [~~his~~] the party's own payment bears to
2 the total of claims or judgments outstanding and payable from
3 the fund. Any amounts due and unpaid as a result of such
4 proration shall be paid in the following fiscal years."

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